

RECEIVED

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03-128

FEB 20 2004

Frank Stilwell

From: Clark, John F - WDC [JFClark@perkinscole.com]
Sent: Tuesday, February 17, 2004 9 05 PM
To: 'Jo Reese', Charlene Vaughn, Alan Downer, Bobeck, Ann, Javier Marques, Jay Keithley, John Fowler, NATHPO, schamu@sso.org, Valerie Hauser, Andrea Williams, Andrea Bruns, Bambi Kraus, Betsy Merritt, Frank Stilwell, Sheila Burns, Roger Sherman, gsmith@johnstondc.com, jmartin@usetinc.org, jfowler@erols.com

Subject: RE 2/12 Ex Parte Notice

Hello everyone,

Only Jo Reese submitted comments to the proposed ex parte notice I circulated this afternoon. I have attempted to address Jo's comments in the attached draft, shown in redline, and a clean copy of which I will file with the FCC.

As always, anyone is free to submit their own ex parte notice to supplement this record.

Thanks,

John

-----Original Message-----

From: Jo Reese [mailto:Jo@ainw.com]
Sent: Tuesday, February 17, 2004 3:46 PM
To: Clark, John F. - WDC; Charlene Vaughn; Alan Downer; Bobeck, Ann; Javier Marques; Jay Keithley; John Fowler; NATHPO; schamu@sso.org; Valerie Hauser; Andrea Williams; Andrea Bruns; Bambi Kraus; Betsy Merritt; Frank Stilwell; Sheila Burns; Roger Sherman; gsmith@johnstondc.com; jmartin@usetinc.org; jfowler@erols.com
Subject: RE: ACHP Identification Proposal following the 2/12 TWG Drafting Group meeting

Since I was on the phone and not in the room, I will defer to others on this point. But, my notes do not agree with yours on item #3 in paragraph seven (after the list of attendees) that starts, "The Group summarized the points of agreement" (there are seven numbered points). I do not think that the group agreed that "the method for considering direct effects should not change," since the frame of reference for this would be the June PA, and the final PA would have changes in it intended to address public comments as handled by those signing the PA.

For example, my notes indicate a statement that one of the ACHP reps said something akin to, 'The footprint must have a qualified professional, no question,' and elsewhere in my notes there was discussion that the full evaluation for the direct effects would be done--this was not in the June PA, for example, indicating that we did not know what the direct effects APE section would really have in it. I certainly did not. To address this, you could delete #3 in that paragraph.

Also, the date on the header needs to be modified.

I appreciate the amount of work involved in preparing this summary. I recognize that it is easier to edit to create. Thank you for offering to entertain my review.

Jo
 ACRA

No of Copies rec'd 2
 List ABCDE

2/20/2004

From: Clark, John F. - WDC [mailto:JFClark@perkinscoie.com]
Sent: Tuesday, February 17, 2004 12:18 PM
To: 'Charlene Vaughn'; Alan Downer; Bobeck, Ann; Javier Marques; Jay Keithley; John Fowler; NATHPO; 'schamu@sso.org'; Valerie Hauser; Andrea Williams; Andrea Bruns; Bambi Kraus; 'Betsy Merritt'; Frank Stillwell; Jo Reese; Sheila Burns; Roger Sherman; gsmith@johnstondc.com; jmartin@usetinc.org; jfowler@erols.com
Cc: Andy Lachance (E-mail); Ben G. Almond (E-mail); Connie Durcsak (E-mail); David Jatlow (E-mail); H. Anthony Lehv (E-mail); Harold Salters (E-mail); Tony Russo (E-mail)
Subject: RE: ACHP Identification Proposal following the 2/12 TWG Drafting Group meeting

Hello everyone,

Attached is a proposed draft of an ex parte notice for the meeting of the TWG Drafting Committee last Thursday, February, 12, 2004

Please review this and get back to me with your comments We are required to file this today

Thanks,

John

-----Original Message-----

From: Charlene Vaughn [mailto:cvaughn@achp.gov]
Sent: Friday, February 13, 2004 6:15 PM
To: Alan Downer; Bobeck, Ann; Clark, John F. - WDC; Javier Marques; Jay Keithley; John Fowler; NATHPO; 'schamu@sso.org'; Valerie Hauser; Andrea Williams; Andrea Bruns; Bambi Kraus; 'Betsy Merritt'; Frank Stillwell; Jo Reese; Sheila Burns; Roger Sherman; gsmith@johnstondc.com; jmartin@usetinc.org; jfowler@erols.com
Subject: ACHP Identification Proposal following the 2/12 TWG Drafting Group meeting

Hello Drafting Committee:

I hope that this e-mail is waiting for you on Tuesday morning and that you have had a wonderful weekend

The teleconference call-in information is as follows:

Date:	Tuesday, February 17, 2004
Time:	11:00 a.m. until 12:30 p.m. (est)
Dial-in number:	888-387-8686
Access No	7120435, then press #

In preparation for the teleconference, I am attaching the ACHP's revised language for *Section IV, Identification and Evaluation*, of the draft FCC Nationwide Programmatic Agreement. While we were unable to reach agreement regarding all aspects of the changes needed to streamline the identification process during Thursday's meeting, I believe that we made significant progress in certain areas. Building upon the points of agreement, John Fowler, Valerie Hauser and I prepared revised language that achieves the following goals.

2/20/2004

1. Eliminates the need for surveys for visual effects.
2. Allows applicant to use their discretion regarding the use of qualified professionals when preparing the list of historic properties for visual effects.
3. Limits the sources to be considered when identifying historic properties within the area of potential effect for visual effects.
4. Clarifies the role of Indian tribes and Native Hawaiian organizations in the identification process for visual effects if they agree to consult with applicants.
5. Allows the SHPO/THPO to add properties to the list of identified properties for visual effects when such properties are a) located within the area of potential effect, b) included in the SHPO inventory, and c) meet the National Register criteria
6. Allows the ACHP to have a role in the resolution of disputes regarding identification and evaluation

There are obviously other issues that require further negotiation. However, we are hopeful that at the outset of Tuesday's teleconference such issues can be identified and the major concerns clearly articulated. Since we only have until **Thursday, February 19th** to finalize the language that will be submitted to FCC, we would like all parties to be given the opportunity to share their comments and suggest changes that advance the overall goal of improving the eligibility process for telecommunications activities.

Thanks for all the hard work you have put into this task. It has been quite challenging. Nonetheless, I hope that at the end of this process we can all see the benefits of our collaboration

Charlene

February 17, 2004

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW – Room TW-A325
Washington, D.C. 20554

Filed via Electronic Filing

**Re: *Ex Parte* Presentation in the Proceeding Entitled "Nationwide
Programmatic Agreement Regarding the Section 106 National Historic
Preservation Act Review Process" – WT Docket No. 03-128**

Dear Ms. Dortch:

On Thursday, February 12, 2004, the following individuals, representing the companies or associations indicated, all members of the Drafting Committee of the working group established by the Advisory Council on Historic Preservation ("ACHP") and known as the Telecommunications Working Group ("TWG"), conducted a meeting of the Drafting Committee at which an official of the Commission also participated, to discuss issues relevant to the above-identified proceeding.

John Clark –	Perkins Coie LLP – The Wireless Coalition to Reform Section 106
John Fowler	Advisory Council on Historic Preservation ("ACHP")
Valerie Hauser	ACHP
Jay Keithley	PCIA – The Wireless Infrastructure Association
Betsy Merritt	National Trust for Historic Preservation
Nancy Schamu	National Conference of State Historic Preservation Officers ("NCSHPO")
Roger Sherman	Sprint Corporation
Greg Smith	United South and Eastern Tribes ("USET")
Charlene Vaughn	ACHP
Andrea Williams	Cellular Telecommunications & Internet Association ("CTIA")

The following persons participated in the above-described meeting by means of a telephone link

Ann Bobeck	National Association of Broadcasters ("NAB")
Sheila Burns	Environmental Resource Management ("EMR")
Bambi Kraus	National Association of Tribal Historic Preservation Officers ("NATHPO")
Jo Reese	Archeological Investigations Northwest, Inc. – American Cultural Resources Association ("ACRA")

The Commission official present for this meeting was as follows:

Frank Stilwell	Wireless Telecommunications Bureau ("WTB")
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In this meeting, the ACHP representatives stated that the purpose of the meeting was to continue the discussion started in the conference call on February 6, 2004 of the "ACHP Proposal for Expediting Identification and Evaluation for Visual Effects" dated January 29, 2004, which was circulated at the TWG meeting on that date

The group first discussed the use of qualified professional consultants and whether the use of such professionals should be required to determine the applicability in the field of an exclusion contained in the NPA. Industry representatives stated that they often do use such consultants in Section 106 reviews, but that this agreement should not eliminate flexibility on this issue. Several views were expressed about the benefits to the process from the use of qualified professionals.

Deleted: needed

The group discussed a document entitled "Proposed Amendments to the Nationwide Programmatic Agreement For Review of Effects On Historic Properties For Certain Undertakings Approved By The Federal Communications Commission " (Copy attached as Attachment I).

The group agreed that one goal of the drafting committee was to eliminate the requirement of surveys for visual effects to properties whose eligibility for the National Register of Historic Places is undetermined. The group also agreed that visual effects would be considered in the case of properties listed and determined eligible for the National Register, and the point of the discussion was to determine what other properties should also be considered. The group agreed that this group of properties should be ascertainable, finite and not open-ended.

The group discussed several methods of categorizing other properties that might be considered for visual effects, with most of the methods based on determinations of eligibility of various kinds. The NCSHPO representative insisted that applicants

should evaluate all properties in the SHPO's inventory of properties and consider visual effects to any that appear to meet the criteria for eligibility. Industry representatives provided to the group a chart taken from the Department of the Interior's website showing that there are over 3.6 million properties on state inventories. (Copy attached as Attachment 2) The NCSHPO representative acknowledged that the quality, size and form of SHPO inventories varied greatly, and that not all properties contained on an inventory would be considered eligible for the national register.

The representative from the National Trust suggested the group consider some form of a program operating in Ohio, where SHPO office charges \$150 to prepare a list of properties in the area of potential effects ("APE") of a project

The group summarized the points of agreement in this discussion involving visual effects, which included the following. (1) there should be no surveys for visual effects; (2) the use of qualified professionals should be options; (3) limitations that the Drafting Committee agrees should be placed on consideration of visual effects to potentially eligible properties are not intended to apply to, and shall not affect, the method for considering direct effects in the NPA. (4) the universe of eligible properties for which visual effects should be considered should be limited, finite and not open-ended, (5) the concept of "inventory" needs to be clarified; (6) the NPA can neither require nor prohibit fees to SHPOs. (7) research to identify eligible properties should be confined to records readily ascertainable and available in SHPO's offices, not off site

Deleted* should not change.

The National Trust representative strongly urged that the SHPO be allowed identify in the consultation properties in the APE that the SHPO has a good reason to believe is eligible. The group generally agreed that if so, the SHPO should do this within the 30-day review period. The group considered whether properties in the process of nomination to the National Register should be included, and agreed that if so, there should be a required filing or ascertainable step that would trigger this category. The group proposed that properties the subject of a prior Section 106 review where the agency and the SHPO agreed to consider the property eligible (called "consensus DOE" properties), might be considered for visual effects

The USET representative stated that he was gratified that this proposal did not change the procedures for consideration of physical effects, which are the primary concern for tribes. He also stated that visual effects are more important to tribes in the west than in the east. An ACHP representative stated that her agency would not agree to a provision that required tribes to post properties on lists

One ACHP representative stated that it was important that industry have some comfort with the final product because "you do the work."

Acknowledging that this letter does not purport to repeat all of the statements from all participants in this meeting, but only to summarize the main topics of discussion as required in the Commission's rules, this notice is submitted on behalf of the non-FCC parties identified above, except for the ACHP, which the Commission has ruled is exempt from compliance with the Commission's *ex parte* rules in this proceeding

Respectfully submitted,

John F. Clark
Counsel to the Wireless Coalition to Reform Section 106

JFC:jfc

Attachment 1

**February 9, 2004
The Wireless Coalition to Reform Section 106**

Proposed Amendments to the

NATIONWIDE PROGRAMMATIC AGREEMENT FOR REVIEW OF EFFECTS ON HISTORIC PROPERTIES FOR CERTAIN UNDERTAKINGS APPROVED BY THE FEDERAL COMMUNICATIONS COMMISSION

**To Allow Consideration of Visual Effects to Certain Designated Properties
and to
Eliminate Consideration of Visual Effects to
Other Properties Only Potentially Eligible for the National Register**

INTRODUCTION AND SUMMARY

The redline-highlighted language in the sections appearing below are proposed amendments to the Nationwide Programmatic Agreement ("NPA") currently under consideration by the Federal Communications Commission ("FCC"). The amendments are designed to be inserted into the identified sections of the NPA for the purpose of eliminating consideration of visual effects to most properties that are only potentially eligible for the National Register of Historic Places ("National Register").

The amendments would allow full consideration and evaluation of all physical effects to all properties, including potentially eligible properties, exactly as is currently required by the NPA. The amendments also allow consideration of visual effects, as appropriate under the current provisions of the NPA, but limited as follows:

1. Visual effects to a property (including a potentially eligible property) from an undertaking may be considered and evaluated whenever that undertaking will be constructed on or within the boundary of, or will

otherwise cause physical alteration or destruction of or damage to, that property.

2. Otherwise, only visual effects to published designated properties (as that term is defined in the amendments) within an undertaking's area of potential effects ("APE") may be considered and evaluated.

Four Types of "Designated Properties". In summary, the proposed amendments define the term "designated property" to include the following four categories of property: (1) a property included in the National Register; (2) a property determined eligible by the Keeper of the National Register; (3) a property that has been previously determined, by both a SHPO and either a federal agency or an Indian tribe or Native Hawaiian organization ("NHO"), to meet the National Register criteria for eligibility or is identified by a SHPO as being in the process of nomination to the National Register; and (4) an eligible property that an Indian tribe or NHO identifies and submits to the FCC's Tower Construction Notification System ("TCNS")

Four Publicly Accessible Lists. Under these amendments, the location of all designated properties (except those requiring confidential treatment) will be readily and publicly identifiable without the need for specialized training or qualifications. Properties in the first two categories described above will be publicly accessible on the familiar lists published by the Keeper. Properties in the third category will be publicly accessible on a list to be created and published by each SHPO, which will be called the SHPO National Register List, or "SNR List." Properties in the fourth category will be publicly accessible on the TCNS

Limitation on Identification of Properties. Because all of the properties for which visual effects may be considered will be readily and publicly identifiable on one of the four lists described above, the proposed amendments also eliminate requirements of identification of, and consideration of visual effects to, all potentially eligible properties not physically affected, and not appearing on one of the four lists

PROPOSED AMENDMENTS

The following are the proposed amendments, identified by the specific section of the NPA into which they would be inserted, and shown here in redline. The main operative sections implementing the limitation on consideration and identification of potentially eligible properties for visual effects would appear in Section VII, as follows:

VII. IDENTIFICATION, EVALUATION, AND ASSESSMENT OF EFFECTS

Deleted: 1

B. Definition of the Area of Potential Effects

2 Visual Effects

a Visual effects from an Undertaking shall only be considered or evaluated under this Agreement: (1) in the case of potential visual effects to a particular Property or Historic Property, where the Undertaking is located on or within the boundary of, or will otherwise physically alter, damage or destroy, that Property or Historic Property; or (2) in the case of potential visual effects to a Designated Property within the APE of an Undertaking, where the visual effects to that Property meet the criteria for effects to Historic Properties

C Identification of Historic Properties

2 The level of effort and the appropriate nature and extent of identification efforts will vary depending on the location of the project, the likely nature and location of Historic Properties within the APE, and the current nature of and thoroughness of previous research, studies, or Section 106 review No identification of any Property is required where the only potential effect to that Property is visual.

Definitions. In addition, the following four definitions would be added to Section II

II. DEFINITIONS

A The following terms are used in this Nationwide Agreement as defined below

4. Boundary. The boundary of the area of historic significance for purposes of determining the eligibility of a Property for the National Register. For a Property included in or determined eligible for the National Register, the boundary is specified in the Property's nomination, either in a verbal boundary description, a metes-and-bounds description, a map, or some other method of specifically delineating its boundary. For other Properties, the boundary is a line surrounding the Property that encompasses, but does not exceed, the full extent of the significant resources and significant land areas that make up the Property and that retain integrity. A boundary for any Property should be large enough to include all historic features of that Property, but should not include buffer zones or areas not directly contributing to that significance, or peripheral areas of the Property that no longer retain integrity.

10. Designated Property. For purposes of this Agreement, a Designated Property is any of the following:

- a. A Historic Property included on the National Register and appearing on the current list of such properties published in the Federal Register,
- b. A Historic Property determined by the Keeper of the National Register to be eligible for inclusion on the National Register and appearing on the current list of such properties published in the Federal Register,
- c. A Property appearing on a current SNR List, and
- d. Any Property of religious and cultural significance to an Indian tribe or NHO and appearing on either an SNR List or a list of such Properties published on the FCC's Tower Construction Notification System ("TCNS"). A SHPO shall add to its SNR List, and the FCC shall post on the TCNS, any Property that meets the National Register criteria for eligibility for which an Indian tribe or NHO submits a request for listing. The FCC and the SHPO will accord confidential treatment to any Property listing when

appropriate under the provisions of Section 800.11(c) of the Council's rules (36 C.F.R. § 800 11(c)).

12. SNR List or SHPO National Register List . A list created and maintained by a SHPO containing the names and identifying information of Properties in its state that have been previously determined, by both the SHPO and either a federal agency or an Indian tribe or NHO, to meet the National Register criteria for eligibility, or that the SHPO identifies as being in the process of nomination to the National Register. The SNR List shall contain each Property's name, its description as either a district, site, building, structure or object, its specific address or location description (or a notice of confidential treatment of this information as provided in Section 800 11(c) of the Council's rules (36 C.F.R. § 800 11(c)), and the date of initial listing.

The SHPO shall publish and regularly update the SNR List on the Internet. Any property that is not either included in the National Register or determined by the Keeper to be eligible for inclusion within three years of the date of initial listing shall thereafter not be considered to be on the SNR List for purposes of this Agreement.

13. Property A district, site, building, structure or object that appears to meet the criteria of eligibility for listing in the National Register

Attachment 2

States	ARCHEOLOGICAL SITES			HISTORIC PROPERTIES					
	SHPO Inventory	No. in Database ⁽¹⁾	No. Digitized ⁽²⁾	SHPO Inventory	No. in Database	No. Digitized	SHPO Inventory	No. in Database	
Alabama	19,758	197 58	0 00	40,000	0 00	0 00	100	C	
Alaska	16,827	143 03	0 00	6,931	38 12	0 00	7,163	57	
Arizona	100,000	800 00	600 00	39,000	179 40	128 70	16,000	40	
Arkansas	34,190	341 90	341 90	28,000	210 00	56 00	4,242	42	
California	120,000	840 00	240 00	112,000	1,120 00	896 00	110,000	825	
Colorado	75,000	712 50	0 00	70,000	665 00	0 00	14,000	133	
Connecticut	4,429	44 29	44 29	76,000	760 00	608 00	1,574	15	
Delaware	2,500	0 50	2 00	29,000	5 80	2 90	320	3	
Dist of Columbia	5	0 00	0 00	30,000	300 00	0 00	27	C	
Florida	22,190	221 90	199 71	100,298	1,002 98	1,002 98	5,437	54	
Georgia	28,000	280 00	280 00	68,000	340 00	380 80	2,102	5	
Hawaii	15,000	132 00	135 00	7,000	37 10	0 00	5,000	50	
Illinois	16,000	160 00	160 00	160,000	0 00	0 00	500	5	
Indiana	47,500	427 50	0 00	166,000	166 00	0 00	22,700	C	
Iowa	18,737	178 00	0 00	100,000	50 00	0 00	7,500	45	

Kansas	11,000	110 00	110 00	38,000	380 00	0 00	2,640	25	
Kentucky	20,000	200 00	80 00	38,450	380 66	0 00	6,270	62	
Louisiana	14,193	141 93	93 67	30,000	0 00	0 00	2,162	21	
Maine	7,688	76 88	5 38	20,000	124 00	0.00	685	6	
Maryland	10,000	90 00	95.00	35,000	290 50	199 50	1,500	15	
Massachusetts	8,000	76 00	0 00	250,000	1,300 00	550.00	1,656	C	
Michigan	19,151	191 51	0 00	312,000	124 80	0 00	1,924	15	
Minnesota	10,000	100 00	0 00	39,070	386 79	0 00	3,336	33	
Mississippi	16,000	160 00	144 00	28,000	0 00	0.00	5,489	C	
Missouri	40,000	40 00	0 00	190,000	570 00	0 00	5,360	C	
Montana	0	0 00	0 00	34,000	340 00	0 00	19,500	195	
Nebraska	6,100	61 00	30 50	50,000	350 00	0 00	7,000	70	
Nevada	50,000	250 00	5 00	6,000	18 00	0 00	15,100	75	
New Hampshire	1,800	0 00	0 00	10,000	0 00	0 00	660	C	
New Mexico	120,000	1,200 00	1,200 00	1,500	15 00	0 00	58,277	576	
North Carolina	31,910	165 93	0 00	100,000	300 00	0 06	4,669	6	
New Jersey	5,000	0 00	0 00	150,000	150 00	0 15	3,200	4	
New York	11,000	110 00	88 00	175,000	1,750 00	3 50	4,050	C	
North Dakota	25,000	200 00	0 00	15,000	150 00	0.00	7,000	70	

Ohio	35,000	210 00	0 00	100,000	1,000 0 0	0 00	5,300	C	
Oklahoma	16,000	160 00	0 00	10,000	10 00	0 00	8,240	81	
Oregon	32,000	9 60	0 00	28,000	268 80	0 00	17,023	17C	
Pennsylvania	17,800	174 44	172 66	105,000	1,050 0 0	8.93	2,900	2E	
Puerto Rico	1,000	8 00	0 00	1,156	11 56	0 00	41	C	
Rhode Island	2,157	21 57	6 47	14,000	140 00	1 33	502	4	
South Carolina	21,000	210 00	210 00	40,000	200 00	1.16	6,300	E	
South Dakota	12,000	120 00	0 00	1,800	16.20	0 00	5,500	5E	
Tennessee	16,500	165 00	160 05	140,000	980 00	4 90	7,000	3E	
Texas	60,000	600 00	600 00	152,000	1,520 0 0	8.51	10,700	107	
Utah	65,000	396 50	455 00	83,750	837 50	0 00	24,140	23E	
Vermont	4,000	20 00	6 00	60,000	60 00	0.03	180	C	
Virgin Islands	750	0 00	0 00	2,000	0 00	0 00	750	C	
Virginia	30,000	300 00	300 00	100,000	210 00	0 63	3,642	C	
Washington	20,000	194 00	170 00	45,000	0 00	0.00	9,700	4E	
West Virginia	8,100	1,620 00	7,290 00	30,000	3,000 0 0	1,500 00	560	56C	
Wisconsin	28,297	282 97	0 00	130,000	1,040 0 0	0 00	5,909	5E	

Wyoming	42,750	427.50	4.28	14,250	142.50	0.00	35,000	:	
TOTAL	1,339,332	12,572.03	13,228.91	3,611,205	21,990.71	5,354.08	490,530	4,110	